STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 217991

:AY WILKIE, Personal Representative
)f the Estate of PAUL K. WILKIE,
)eceased, and JANNA KAY FRANK,

Plaintiffs-Appellees

. Docket No. 119295

.UTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Defendant-Appellant Auto-Owners Insurance Company appeals the decision of the Court f Appeals dated May 1, 2001, pursuant to an Order of this Court dated September 10, 2002 ranting Auto-Owners' Application for Leave to Appeal.

STATEMENT OF QUESTIONS INVOLVED

WHETHER THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT THE LIMIT OF LIABILITY IN THE AUTO-OWNERS INSURANCE POLICY WAS AMBIGUOUS BECAUSE OF THE COURT'S VIEW OF THE "REASONABLE EXPECTATIONS" OF THE POLICYHOLDER?

The Court of Appeals would say "no."

Plaintiffs-Appellees would say "no."

Defendant-Appellant says "yes."

WHETHER THE RULE OF REASONABLE EXPECTATIONS IS A SOUND PRINCIPLE OF CONTRACT LAW?

The Court of Appeals did not address this issue.

Plaintiffs-Appellees would say "yes."

Defendant-Appellant says "no."

[I. WHETHER THE RULE OF REASONABLE EXPECTATIONS SHOULD BE APPLIED INDEPENDENT OF A FINDING OF AMBIGUITY IN AN INSURANCE CONTRACT?

The Court of Appeals would say "yes."

Plaintiffs-Appellees would say "yes."

Defendant-Appellant would say "no."

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

.. The Accident Leading To The Claim

The material facts giving rise to this lawsuit are undisputed. The case arises out of a ıotor vehicle accident that occurred on April 17, 1996. Stephen Ward, age 31, was driving a 991 Olds Cutlass (the "Ward vehicle"). The Ward vehicle was owned by Stephen Ward and his ife, Tina Ward (App, p 7a). The Ward vehicle was insured under a policy issued by Citizens ısurance Company of America ("Citizens").

Janna Frank, age 37, was driving a 1978 Olds Cutlass owned by Kay Wilkie at the time f the accident (the "Wilkie vehicle"). Paul Wilkie, age 33, was riding in the front passenger ꞉at of the Wilkie vehicle. Kay Wilkie is Paul Wilkie's mother. (App, p 7a.)

At the time of the accident, Ms. Frank was heading east on Maple Rapids Road in Clinton ounty. Mr. Ward was heading west. Maple Rapids Road is a two lane road with one eastbound ıne and one westbound lane. Witnesses to the accident reported to investigating deputies that Ir. Ward was driving erratically and crossed over the centerline several times. In doing so, he ›rced an eastbound vehicle driven by Ronald Neideffer off the road. The Ward vehicle was ɔmpletely over the centerline when it struck the Wilkie vehicle. The force of the collision illed Mr. Ward and Mr. Wilkie. Ms. Frank survived the accident with serious injuries. The arties stipulated that the accident was the fault of Stephen Douglas Ward and that his estate was ꞉gally liable for those damages. (App, p 121a.) The parties further stipulated that the damages › Ms. Frank and the Estate of Paul Wilkie resulting from Ward's actions equaled or exceeded 100,000. (App, pp 121a-122a.)

;. The Insurance Policies At Issue

The Ward vehicle was insured by Citizens. The Citizens' policy has a single limit of ability of $50,000 per occurrence; it does not have a separate per person liability limit. In other ords, the limit of liability per person is the same as the per occurrence limit of $50,000. (App, p 7a, 99a.) Ultimately Ms. Frank and the Estate of Paul Wilkie ("Plaintiffs") agreed to split the 50,000 limits under the Citizens' policy so that each was paid $25,000.

Before entering the settlement with Citizens, Plaintiffs also negotiated with Auto-Owners ısurance Company ("Auto-Owners"), the insurer of the Wilkie vehicle. Plaintiffs took the osition that they were entitled to benefits under the "underinsured motorist" coverage afforded y the Auto-Owners' policy. The underinsured motorist coverage, set forth in a separate ndorsement to the no-fault automobile policy issued by Auto-Owners to Kay Wilkie, states in elevant part:

> COVERAGE
>
> a. **We** will pay compensatory damages any person is legally entitled to recover:
>
> (1) from the owner or operator of an **underinsured automobile**;
>
> (2) for **bodily injury** sustained while occupying or getting into or out of an **automobile** that is covered by **Section II - Liability Coverage** of the policy.

ıpp, p 51a (emphasis in original).

While Auto-Owners originally disputed whether the collision resulted from an "accident" ır a suicide attempt by Mr. Ward, it eventually withdrew this defense, and the parties stipulated hat Plaintiffs could settle their claims against the Estate of Stephen Douglas Ward and that ıuto-Owners would not assert any defense under Ward's policy that may have arisen because of he settlement. (App, p 122a.)

Because Plaintiffs each recovered $25,000 in liability insurance payments from Citizens ıd each sustained damages greater than $100,000, each made a claim under the underinsured ıotorist provision of the Auto-Owners' policy. The Auto-Owners' policy has limits of $100,000 er person, $300,000 per occurrence for underinsured motorists. The six month premium for this overage is $6.34. (App, p 31a).[1]

'. **The Lawsuit Is Filed**

Plaintiffs and Auto-Owners disagree regarding the proper interpretation of the "Limit of iability" clause in the underinsured motorist endorsement. That provision states:

4. LIMIT OF LIABILITY

   a. **Our** Limit of Liability for Underinsured Motorist Coverage shall not exceed the lowest of:

      (1) the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability bonds and policies available to the owner or operator of the **underinsured automobile**; or

      (2) the amount by which compensatory damages for **bodily injury** exceed the total limits of those **bodily injury** liability bonds and policies.

   b. The Limit of Liability is not increased because of the number of:

      (1) **automobiles** shown or premiums charged in the Declarations;

      (2) claims made or **suits** brought;

      (3) persons injured; or

      (4) **automobiles** involved in the **occurrence**.

In its Opinion, the Court of Appeals noted that the premiums for the "underinsured" and "uninsured" motorist coverage were identical in the Wilkie policy. While this is true for this particular risk, it is not true generally. The Court of Appeals attempted to draw general conclusions about what a policyholder would "reasonably expect" from the fact that the premiums for these two coverages happened to be identical for this particular policy without any evidence in the record to support its conjecture. (App, p 127a-128a.)

.pp, p 52a (emphasis in original.)

Under Plaintiffs' theory: (1) each of the Plaintiffs receives $100,000 in underinsured ıotorist coverage as a result of the accident; (2) from that $100,000, Auto-Owners receives a credit" of $25,000 attributable to the liability payment received by each Plaintiff from Citizens; nd (3) Auto-Owners therefore allegedly owes each Plaintiff $75,000. Plaintiffs contend that .uto-Owners may "set-off" only those amounts actually received by the injured person from the ›rtfeasor, Ward, rather than a set-off equal to the limit of $50,000 expressly stated as the total mits of the bodily injury coverage provided in the declarations page of Ward's policy.

In contrast, Auto-Owners contends that each Plaintiff starts with $100,000 in nderinsured motorist coverage as a result of the accident. From that $100,000, Auto-Owners ıen determines the maximum extent of its liability pursuant to Section 4 of the policy, "Limit of iability." In this case, Auto-Owners' liability to each claimant shall not exceed the lowest of ıe amount by which the underinsured motorist coverage limits stated in the Auto-Owners' eclarations sheet (i.e., $100,000 per person) exceeds the "total limits of all bodily injury liability onds and policies available to the owner of operator of the underinsured automobile." Because ıe total limit of Ward's policy is $50,000, Auto-Owners' liability is capped under the policy at 100,000 minus $50,000. This results in a maximum benefit for each claimant of $50,000, ·ithout regard to whether the claimant actually received any of the benefits payable under the Vard's policy.

When the parties were unable to resolve their dispute, Plaintiffs filed the instant lawsuit ı the Clinton County Circuit Court. Auto-Owners denied liability and filed a counterclaim ɜeking a declaration of the benefits due under the policy.

. **The Trial Court Enters Summary Disposition**

Plaintiffs filed a motion for summary disposition with the trial court. Auto-Owners ·sponded with a cross-motion for summary disposition pursuant to MCR 2.116(I)(2) based on a ıeory that the collision was not an "accident," but a successful suicide by Stephen Ward. The ial court granted summary disposition to Plaintiffs, calculating Auto-Owners' limits of liability ısed on the amount each Plaintiff actually received from Ward's policy, rather than from the mits contained in that policy. (App, pp 119a-120a.) After entry of the order granting Plaintiffs' .otion and denying Defendant's motion, the parties stipulated to entry of a judgment that ·eserved Defendant's right to appeal the issues presented here. (App, p 121a-124a.)

. **The Decision of the Court of Appeals**

On May 1, 2001, the Court of Appeals, in a decision written by the Honorable Jane [arkey, affirmed the trial court's order granting Plaintiffs' motion for summary disposition. \pp, pp 125a-131a.) In the Opinion, the Court of Appeals concluded that the policy language at sue was "ambiguous" and not consistent with the "reasonable expectation of the policyholder." n this basis, the Court of Appeals held that each Plaintiff should receive $75,000 from Auto-wners under the underinsured motorist coverage (*i.e.*, $100,000 minus the amount received om Citizens of $25,000 each). Because the decision of the Court of Appeals is inconsistent ith the principles of contract interpretation set forth by the Michigan Supreme Court, and ecause it attempts to use the doctrine of "reasonable expectations" to override unambiguous olicy language, Auto-Owners filed an application for leave to appeal. This Court granted Auto-wners leave to appeal the decision of the Court of Appeals in an order dated September 10,)02. In its order, this Court directed the parties specifically to address the following issues:

(1) whether the disputed insurance policy provisions are ambiguous;

(2) whether the "rule of reasonable expectations" can be applied independent of a finding of ambiguity; and

(3) whether the "rule of reasonable expectations" is a sound principle of contract law.

I.

ARGUMENT

THE COURT OF APPEALS ERRED BY CONCLUDING THAT THE LIMIT OF LIABILITY STATED IN THE INSURANCE POLICY IS AMBIGUOUS BASED SOLELY ON THE "REASONABLE EXPECTATIONS" OF THE INSURED WHICH ARE CONTRARY TO THE PLAIN LANGUAGE OF THE POLICY.

Introduction

Plaintiffs ask the Court to invalidate an unambiguous limit of liability in order to aximize an injured driver's recovery for non-economic tort damages when the tortfeasor has urchased insurance with inadequate limits. There is no basis in Michigan statutes, case law or ublic policy for granting Plaintiffs' request.

The Legislature, when adopting Michigan's landmark No-Fault Act, MCL 500.3101 *et eq*, guaranteed unlimited medical care, specified work loss benefits and survivor's benefits to all ersons involved in motor vehicle accidents, regardless of fault, and regardless whether private utomobile insurance is in place, by establishing an assigned claims facility. MCL 500.3172. he Legislature did not provide a similar guarantee, however, that non-economic tort damages ould be collectible in the event that the owner of a vehicle failed to fulfill its statutory bligation to obtain residual liability insurance, or failed to purchase insurance adequate to cover e full amount of tort damages sustained by an injured party. The Legislature also did not rotect multiple claimants from the possibility that tort damages would not be recovered fully ecause the liability limits were divided among multiple claimants. Nor did the Legislature bar nsurance companies from limiting the scope of their liability for non-economic tort damages for ninsured or underinsured motorists.

The Court of Appeals' ruling invalidated an unambiguous policy provision limiting the ıaximum benefits payable when a policyholder suffers bodily injury resulting from the actions f an underinsured tortfeasor. By superimposing its view of what a policyholder would :easonably expect," the Court of Appeals erroneously concluded that the policy language at sue is "ambiguous." No valid principle of contract interpretation can be read to authorize the ıle of law created by the Court of Appeals decision.

Because the decision of the Court of Appeals involves a question of law and the grant of ımmary disposition under MCR 2.116(C)(10), it is reviewed de novo. *Universal Underwriters ıs Co v Kneeland*, 464 Mich 491, 495-496; 628 NW2d 491 (2001).

A. <u>Because Underinsured Motorist Coverage Is Not Mandated By The No-Fault Statute, The Terms Of The Policy Control The Scope Of Benefits Provided.</u>

The No-Fault Act requires an owner or registrant of a motor vehicle to obtain security for ayment of benefits under personal protection insurance, property protection insurance and ;sidual liability insurance. MCL 500.3101(1). Residual liability insurance must afford ɔverage for bodily injury damages of not less than $20,000 because of bodily injury or death of ne person in any one accident, or a maximum of $40,000 per occurrence. MCL 500.3009(1).

Before adoption of the No-Fault Act, Michigan also required owners to carry coverage ɔr uninsured motorists. This requirement was repealed at the time the No-Fault Act was ɗopted.[2] Unlike a number of other states, Michigan has never required an owner or registrant to arry coverage for underinsured motorists. In other words, while Michigan mandates the ıinimum residual liability coverage that a no-fault policy must offer, it does not require an wner to purchase coverage to apply when the tortfeasor's residual liability limits are inadequate) cover the bodily injuries sustained.

See pages 15-23, *infra*.

Because underinsured motorist coverage is not a mandatory coverage under the No-Fault .ct, the interpretation of policy language providing such coverage is governed by contract law rinciples. *See e.g., Rolhman v Hawkeye Security Ins Co,* 442 Mich 520, 530; 502 NW2d 310 993); *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 68; 467 NW2d 17 (1991). This 'ourt has recently confirmed that optional coverages must be construed as written, and can be mited or voided by the insurer on terms specified in the policy. In *Husted v Auto-Owners Ins 'o*, 459 Mich 500; 591 NW2d 642 (1999), this Court articulated this fundamental principle:

> [T]he language of the no-fault act indicates that it does not require residual liability insurance to cover an insured's *operation* of *any* vehicle. In other words, such coverage is not mandatory under the no-fault act. This Court has indicated that a policy exclusion that conflicts with the mandatory coverage requirements of the no-fault act is void as contrary to public policy. *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 232; 531 NW2d 138 (1995). However, because the no-fault act does not mandate residual liability coverage for an insured's operation of any vehicle, it would not void an otherwise valid and unambiguous exclusion, like the business-use exclusion at issue here.

Iusted, 459 Mich at 511-512 (emphasis in original).

This principle was confirmed recently in *Universal Underwriters Ins Co v Kneeland*, *upra*, 464 Mich 491. In *Universal Underwriters*, this Court again reiterated that nonmandatory overages are "purely a matter of contract." *Id*. at p 500. Because coverage for underinsured ıotorists is optional, the policy language agreed upon by the parties controls the scope of Auto-)wners' liability.

B. The Underinsured Motorist Endorsement Unambiguously Limits Auto-Owners' Maximum Liability Based On The Total Limits Available To The Tortfeasor In The Tortfeasor's Policy.

Whether contract language is ambiguous is a question of law that the Court reviews de ɔvo. *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 330; 550 NW2d 28 (1996). Whether a contract is ambiguous depends on whether reasonably conflicting ıterpretations can be drawn from the policy language. As explained in *Raska v Farm Bureau ſut Ins Co*, 412 Mich 355; 314 NW2d 440 (1982):

> A contract is said to be ambiguous when its words may reasonably be understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage. Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.

l at 362. *See also*, *Farm Bureau Mutual Ins Co of Michigan v Nikkel,* 460 Mich 558. 566; 596 [W2d 915 (1999) (citing *Raska* with approval); *Universal Underwriters*, *supra* at 496.

Here, the Court of Appeals held that the language at issue was ambiguous because it "can e interpreted in at least two ways." (App, p 127a.) This conclusion, however, is based on the ourt's apparent preconception regarding the amount of "credit" that the court believes Auto-)wners should apply. It is not based on the express language of the policy, which is not usceptible to more than one interpretation.

The controlling contractual provision here is paragraph 4a(1) of the underinsured ıotorist endorsement. That provision is not a "set-off" provision against which credits are pplied. Rather, it is a provision that states the maximum limit that Auto-Owners will pay ursuant to the underinsured endorsement. As expressly stated in the endorsement, Auto-)wners' limit of liability shall not exceed:

> (1) The amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile ....

App, p 52a.) Each term in this clause is easily understood. The first part of the clause requires determination of the "Underinsured Motorist Coverage limits stated in the Declaration." This ; readily determined by reviewing the declarations page of the Auto-Owners' policy, which xpressly states under the heading of "LIMITS" for underinsured motorist coverage, limits of $100,000 person/ $300,000 occurrence." (App, p 31a.) Therefore, for any person making a laim under the underinsured motorist provision, the first number that is placed into the formula ; $100,000 per person, with a maximum of $300,000 per occurrence. Because there are two laimants in this case, each claimant would use the $100,000 limit expressly stated in the Auto-)wners' declaration page.

The next step is to determine the "total limits of all bodily injury liability bonds and olicies available to the owner or operator of the underinsured automobile." This amount is also eadily identified. Stephen Ward is the owner or operator of the underinsured automobile. Vard's only bodily injury policy available for this accident is the Citizens' policy. The parties gree that the total limit under the Citizens' policy is $50,000 for each occurrence." (App, pp 7a, 9a.) Thus, $50,000 is the total limit of all the policies available to the "owner or operator of the nderinsured automobile," *i.e.*, Mr. Ward.

Therefore, under the unambiguous language of the policy, the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all odily injury ... policies available to the owner or operator of the underinsured automobile" is 50,000 ($100,000 per person minus the limit of $50,000 contained in the Ward policy). It is a mits to limits comparison. For each of these Plaintiffs, Auto-Owners' maximum limit of ability for underinsured motorist coverage is therefore $50,000. Auto-Owners has paid that nount to each Plaintiff, and the lower court erred in finding that any further amounts are due.

The Court of Appeals also erroneously held that the policy language is "ambiguous" ecause this case involves multiple claimants, neither of whom received the total liability limits f $50,000 contained in the Citizens' policy. The Auto-Owners' policy, however, is not nbiguous in this case or in any other case involving multiple claimants. The limit of liability ause expressly states that the maximum liability cap is calculated based on the "<u>total</u> <u>limits</u> vailable to the owner or operator of the underinsured automobile" (emphasis added). It says othing about whether those limits are actually paid to any particular claimant, in whole or in art. Rather, the comparison is between the limits of the two policies. For each individual aimant, that means the maximum underinsurance benefit payable is calculated by comparing e $100,000 limits of the Auto-Owners' policy and the $50,000 limits of the Citizens' policy, respective of the amounts any claimant actually receives from Citizens.

If the parties had intended to calculate the maximum limit of liability for underinsured otorist coverage based on the liability payments the claimant actually received from the rtfeasor's insurer, such would have been relatively easy to provide. The policy does not so rovide, however, but contains carefully selected language that states that the liability cap is ased on a comparison between the limits of the two policies. Put simply, the Court of Appeals red by finding an ambiguity in the policy when no such ambiguity exists.

The Court of Appeals also erroneously relied on the case of *Auto-Owners Ins Co v eefers*, 203 Mich App 5; 512 NW2d 324 (1993), *lv den* 445 Mich 939; 521 NW2d 608 (1994) support its conclusion that the policy language at issue in this case is ambiguous. In *Leefers*, e policy contained a limit of liability clause that stated that the underinsured motorist benefits ould not apply "if the owner has insurance similar to that afforded by this coverage and such overage is available to the insured ..." (emphasis added). The court held that this language was mbiguous in the context of multiple claimants because the amount of coverage "available to the isured" might depend on the number of claimants. In the policy at issue in this case, however, le comparison is not based on the "coverage available to the insured." Rather it is based on the coverage available to the tortfeasor" which is always $50,000, regardless of how that liability mit is distributed among various claimants. The Court of Appeals' conclusion that the istinction between what is "available to the insured" and what is "available to the tortfeasor" is "distinction without a difference" (App, p 129a), highlights that the court made no effort to iterpret the language of the endorsement as written. If the policy had stated that the maximum mit of liability was calculated based on what was available to the plaintiff, rather than the iaximum limits available to the tortfeasor, then *Leefers* might apply. This is not the language of ie policy, however. Instead, the policy language states that the limit of liability is calculated ased on the total limits available to the tortfeasor. Here, that limit is expressly stated on the face f the Citizens' policy as $50,000.[3]

C. The Court of Appeals Ruled Contrary To Supreme Court Precedent When It Relied On The Doctrine Of "Reasonable Expectations" To Override The Unambiguous Policy Language.

At several points in its analysis, the lower court concludes that its interpretation is proper ecause it is consistent with "the rule of reasonable expectation." Although the court pays lip ervice to interpreting an unambiguous contract as written, it elevates the doctrine of "reasonable xpectation" to the same level as the language of the contract, stating:

To the extent that *Leefers* is even viewed as applicable, Auto-Owners submits that it was erroneously decided by a panel anxious to create an ambiguity to maximize the recovery of a policyholder in the face of unambiguous policy language that limited such a recovery. This Court need not decide if *Leefers* was correctly decided, however, as the language at issue here differs from that at issue in *Leefers*.

Concomitant to the rules of construction is the rule of reasonable expectation. When determining the existence or extent of coverage under the rule of reasonable expectation, a court examines whether a policyholder, upon reading the contract, was led to reasonably expect coverage. *Gelman Sciences, Inc v Fidelity & Casaulty Co*, 456 Mich 305, 318; 572 NW2d 617 (1998), quoting *Vanguard Ins Co v Clarke*, 438 Mich 463, 472; 475 NW2d 48 (1991), quoting *Powers v DAIIE*, 427 Mich 602, 623; 398 NW2d 411 (1986). If so, coverage will be afforded. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996). Conversely, when determining the priority of coverage, the insurers' reasonable expectations should be accommodated. *Bosco v Bauermeister*, 456 Mich 279, 300-301; 571 NW2d 509 (1997).

.pp, p 126a.

This holding not only misstates the law, it is contrary to the holding in *Farm Bureau v 'ikkel, supra*, where this court rejected both this type of "concomitant" reliance on the insured's xpectation when the contract language is unambiguous, and the plurality decision in the *Powers* ase on which the doctrine is based. The *Nikkel* decision is quoted at length here, because it learly rejects the exact analysis relied on by the Court of Appeals in this case:

In so concluding, we decline defendants' invitation to discern ambiguity solely because an insured might interpret a term differently than the express definition provided in a contract. 'This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972). To the extent that the plurality in *Powers* gleaned ambiguity by relying on an understanding of a term that differed from the clear definition provided in the policy, *Powers* is contrary to the most fundamental principle of contract interpretation — the court may not read ambiguity into a policy where none exists. *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 567; 519 NW2d 864 (1994).

Nor does the location of the clause in the definition section of the policy render it ambiguous. 'An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy.' *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995). 'Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy.' *Raska, supra* at 361-362, 314 NW2d 440. To determine otherwise would hold an insurer liable for a risk it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

***

> Finally, we conclude that the *Powers* plurality improperly relied on the rule of reasonable expectations to defeat the unambiguous policy language. ... Under *Vanguard*, the rule of reasonable expectations has no applicability here because no ambiguity exists in the nonowned automobile clause and the insured could have discovered the clause on examination of the contract. ...As we observed in *Raska*, application of the reasonable expectations rule under the circumstances is contrary to the fundamental principle that the insurer and insured may generally contract regarding the scope of coverage. *See Heniser*, *supra* at 161, 534 NW2d 502. Accordingly, we decline to utilize the rule of reasonable expectations to circumvent the clear policy language at issue in this case.

'ikkel, 460 Mich at pp 567-570 (emphasis added).

Here the Court of Appeals not only rejected the policy language by creating an ambiguity 'here none exists, but it made clear that one of the fundamental bases of its decision was the :easonable expectation" theory. The erroneous interpretation of the policy and the improper :liance on the reasonable expectation doctrine warrant reversal.

Moreover, even if the "reasonable expectation" theory were applicable, it would not ıpport the conclusion of the Court of Appeals. The court held that an insured "could reasonably xpect that the policy limits of the underinsured motorist coverage would be available to him, :ss the amount received from the underinsured motorist." (App, p 127a.) What is the basis for ıis expectation? It certainly is not created by the No-Fault Act, which makes the ability of a laimant to recover for residual liability damages dependent entirely on the collectability of the ırtfeasor. There are no guarantees that the tortfeasor's coverage limits will be sufficient to ɔver all the damages incurred, or even that the tortfeasor will be solvent. The Legislature nposed mandatory minimum limits of $20,000/$40,000, but even that minimum may be split mong multiple claimants. Auto-Owners and the policyholder agreed to limit liability here based n an unambiguous formula. That limit of liability should not be circumvented or increased mply because a panel of the Court of Appeals believes a policyholder would not "expect" to ıare liability limits in multiple claimant situations.

[. THERE IS NO PUBLIC POLICY REASON TO VOID OR LIMIT A POLICY PROVISION THAT IS APPLICABLE TO UNDERINSURANCE COVERAGE WHEN AN INSURED HAS BEEN UNDERWRITTEN AND THE POLICY PRICED BASED ON THE LIMIT OF LIABILITY CLAUSE.

The issue of the enforceability of a limit of liability clause in an underinsurance ıdorsement involving multiple claimants is one of first impression in Michigan. Many other ates have adopted statutes requiring "uninsured" and "underinsured" motorist coverage, and ɔid or refuse to enforce provisions limiting the scope of such coverage in reliance of such atutes.[4] By contrast, Michigan never has had an "underinsured" motorist statute, and repealed s "uninsured" statute at the time the No-Fault Act was adopted. To appreciate the significance f this fundamental difference in public policy fully, it is necessary to review the history which d to the enactment of the No-Fault Act.

Before adoption of the No-Fault Act, every insurance policy sold in this State was quired to contain uninsured motorists coverage for "the protection of persons insured

All the out-of-state cases cited by the Court of Appeals are from states that have adopted statutory requirements that reflect a public policy favoring underinsured motorist benefits, and disfavoring policy limitations on the scope of the insurer's liability. One of the cases cited by the court, *Gust v Otto*, 147 Wis 2d 560, 564; 433 NW2d 296 (Wis App, 1988), not only relies on a statutory provision, but appears to have been overruled by the *Moreno* decision issued in 2000, cited *infra*. *Goughan v Rutgers Casualty Ins Co*, 238 NJ Super 644; 570 A2d 501 (1989), is based on an interpretation of the relevant state statute and the court's view that it would be "unfair and an abuse of the statutory policy to permit a deduction by the UIM carrier." No such statutory policy exists in Michigan. Similarly, *Gonzales v Millers Casualty Ins Co*, 923 F2d 1417 (CA 10, 1991) is based on New Mexico's underinsured motorist coverage statute. All of the cases cited by the Court of Appeals in footnote 5 suffer from these same deficiencies. Clearly, there is a split of public policy on this issue across the country. In Michigan, where there is no statutory favoritism towards underinsured motorist coverage, the unambiguous policy language should be construed as written.

ıereunder," unless such coverage was specifically rejected.[5] In 1965, the Legislature ɜtablished the Motor Vehicle Accident Claims Fund, and the Fund was liable only when the amages caused by an uninsured motorist exceeded amounts payable by an insurer.[6] herefore, before no-fault, an:

> accident victim seeking compensation could proceed only in tort. If the negligent driver was uninsured the victim would ordinarily receive no compensation for his injuries other than that recovered from the Motor Vehicle Accident Claims Fund.

radley v Mid-Century Ins Co, 409 Mich 1, 52; 294 NW2d 141 (1980).

Before the No-Fault Act and the repeal of the uninsured motorist statute, the Michigan upreme Court recognized that the Legislature did not intend to protect a motorist when the atutorily required minimum liability limits proved to be inadequate. As stated by the Supreme ourt in *Lotoszinski v State Farm Mut Auto Ins Co*, 417 Mich 1; 331 NW2d 467 (1982), in ıterpreting the intent of the Legislature in adopting the uninsured motorist statute:

> The Legislature's intent, as we perceive it, was to protect the public from a noninsured, financially irresponsible motorist, <u>not one who was insufficiently insured</u>. See *Lund v Mission Ins Co*, 270 Or 461; 528 P2d 78 (1974). "The protection intended is against an '*un*insured' motorist, not one who is '*under*insured.' The legislature required that a minimum level of coverage be available for each accident when more than one person was injured. <u>It did not undertake to guarantee an irreducible minimum sum available to every injured person under every set of circumstances but simply to make available a *policy*</u>

Before its repeal, Section 3010 of the Insurance Code provided:

> No automobile liability or motor vehicle liability policy *** shall be delivered or issued for delivery in this state *** unless coverage is provided therein or supplemental thereto *** for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including owners or operators insured by an insolvent insurer, because of bodily injury, sickness or disease, including death, resulting therefrom, unless the named insured rejects such coverage in writing provided herein.

ICL 500.3010.

MCL 257.1122.

offering minimum levels of coverage." *Gorton v Reliance Ins Co*, 77 NJ 563, 572; 391 A2d 1219 (1978).

l. at 10-11 (emphasis added; italics in original).

The No-Fault Act and the repeal of the uninsured motorist amendment became effective ı the same day. As part of the No-Fault Act, the Legislature set up an assigned claims facility ır the payment of personal protection insurance benefits. Under the Act, the assigned claims .cility will pay personal protection insurance benefits where "no personal protection insurance applicable to the injury" and under other specified circumstances. MCL 500.3172.

Therefore, the assigned claims facility serves as a "safety net" to guarantee the payment ᷉ personal protection insurance benefits for medical expenses, work loss and survivor's benefits all cases where there is no applicable insurance coverage. Claims submitted to the assigned aims facility are assigned to insurers like Auto-Owners on a rotating basis, and the claims are ıid through an assessment on all insurers writing business in Michigan based on their respective arket shares. MCL 500.3171.

In exchange for providing unlimited medical benefits and wage loss protection to :cident victims, the Legislature placed limitations on the ability of an accident victim to file a rt claim. MCL 500.3135. Unlike with personal protection insurance benefits, the Legislature d not establish any type of safety net for the payment of tort judgments in the event that the ɜgligent driver was either uninsured, not collectible, or underinsured.

The Supreme Court addressed this legislative trade-off shortly after the No-Fault Act was lopted. In the case of *Bradley v Mid-Century Ins Co, supra*, the Court was asked to consider e validity of an exclusion that provided that damages would not be deemed to exceed the ›licy limits and that uninsured motorist coverage of the policy would apply pro rata where there other similar insurance available. Before enactment of the No-Fault Act, this Court had ıvalidated the "other insurance" clauses on public policy grounds, holding that the limitation ıolated the public policy reflected in the uninsured motorist amendment and the Motor Vehicle .ccident Claims Act. *Blakeslee v Farm Bureau Mutual Ins Co of Michigan*, 388 Mich 464; 201 'W2d 786 (1972). Based on the passage of the No-Fault Act, however, this Court held that the egislature had adopted a new public policy trade-off that permitted an insurer to limit its nancial obligations in situations where personal protection insurance benefits were not at issue. he Court described the legislative trade-off as follows:

> We are persuaded that the Legislature repealed the uninsured motorist amendment not because it assumed there would be no uninsured motorists, but because after the passage of no-fault a person injured by an uninsured motorist had a source of recovery for all damages except pain and suffering and excess economic loss.
>
> The uninsured motorist amendment and the Motor Vehicle Accident Claims Act were enacted to assure that persons injured by negligent uninsured motorists would have some source of recovery. The no-fault act, which assures that all persons injured in motor vehicle accidents receive a minimum level of compensation, fulfills that apparent legislative objective.
>
> True, no-fault benefits may be insufficient to fully compensate one injured by a negligent uninsured motorist. But no accident victim is permitted, under the no-fault act, to recover for below-threshold pain and suffering, and one's ability to recover where a tort action is permitted is largely dependent on the fortuitous circumstances of the tortfeasor's collectability and insurance coverage. Because uninsured motorist coverage could, under the uninsured motorist amendment, be refused by an insured, only the fund guaranteed a source of recovery for tort damage and the limit of its liability was $20,000. The Legislature apparently saw the substitution of a right to PIP benefits — unlimited medical expense and work loss and survivor's loss in amounts and for times limited by law — as an appropriate substitute for whatever additional recoveries might result from continuing mandatory uninsured motorist coverage and the possible $20,000 recovery from the fund. We are persuaded that there is no legislative policy requiring us to hold other insurance clauses unenforceable.

radley, 409 Mich at 53-54 (footnotes omitted; emphasis added).[7]

See also, *Husted*, *supra* at 513, holding that:

> In short, the no-fault act guarantees personal protection benefits to accident victims, even in the absence of applicable insurance coverage, in exchange for limitations on the victim's ability to file a tort claim. But the no-fault act does not similarly guarantee

At issue in this case is the parties' agreement to limit liability for underinsured motorist ›verage to the difference between the limits stated in its declarations page and the limits :ovided in the tortfeasor's policy, without regard to whether the tortfeasor's liability limits are ıid to the insured. While this results in a potential situation where the injured party is not able › recover for all of his or her non-economic damages and excess wage loss, the significant ɜnefits afforded by the No-Fault Act fully support the wisdom of the trade-off adopted by the ɘgislature and its decision not to invalidate limitations on the scope of underinsurance ›verage.

Other jurisdictions have recognized and adopted similar trade-offs in their statutes. For ;ample, in California, underinsurance coverage applies only if the injured party's ıderinsurance limits exceed the tortfeasor's bodily injury liability limits – even if the liability ːnits are not actually received by the injured party. The rationale for the California statute[8] was ;plored at length in *State Farm Mut Automobile Ins Co v Messinger*, 232 Cal App 3d 508; 283 al Rptr 493 (1991). There, the insureds, husband and wife, and a passenger settled with the surer of the tortfeasor for the full amount of the tortfeasor's liability limits. The settlement located $290,000 to a passenger in one of the vehicles, and $5,000 to each of the Messingers. he Messingers, who had underinsured policy limits of $300,000, then sought to recover ırsuant to the underinsured motorist clause in their policy, arguing that the clause applied ɜcause they actually received only a small amount of the total limits of the tortfeasor's policy

residual liability coverage, e.g., when a negligent driver is uninsured or uncollectable. The *Bradley* Court's description of this distinction between PIP benefits and residual liability coverage belies plaintiff's contention that the no-fault act guarantees residual liability coverage under the circumstances at issue here.

Section 11580.2, subdivision (p)(2) of the California Insurance Code defines "underinsured motor vehicle" as " a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person." Thus, like the Auto-Owners' policy, the comparison is between the limits of the two policies.

ecause there were multiple claimants from the accident. The court rejected the Messinger's aim that they were entitled to underinsurance benefits, stating:

> A central feature of California's underinsurance scheme is that it "permit[s] individuals to purchase insurance for themselves in an amount they deem appropriate." (*Malone, supra*, 215 Cal App 3d at p 279; *see* § 11580.2, subds.(m) and (n).) As noted in *Rudd, supra*, 219 Cal App 3d at pages 954-55, California's underinsurance scheme is designed to permit "a responsible driver to protect himself against ... minimally insured tortfeasors by purchasing, for his own protection, the insurance which the tortfeasor declined to purchase." *Rudd* continues: " ... the fundamental purpose of section 11580.2 [governing both uninsurance and underinsurance coverage] is to provide the insured with the same insurance protections he would have enjoyed if the adverse driver had been properly insured." (Id. at p. 954.) Section 11580.2 was never designed to place the insured "in a better position that he would have occupied had the other driver carried such insurance." (219 Cal App 3d at p. 954, italics in original.)

32 Cal App 3d at 521 (emphasis added). The *Messinger* court concluded that the nderinsurance benefits did not apply on the facts before it because the Messingers had been eated as if the tortfeasor had carried liability insurance with limits of $300,000. Like all aimants, however, the fact that the policy limits were $300,000 did not mean that the essingers were entitled to receive any or all of the tortfeasor's limits. By concluding that the essingers were not "underinsured" because their limits did not exceed the tortfeasor's limits, e court held that the Messingers were placed in the same situation as they would have been if e tortfeasor had obtained the same liability limits that the insureds obtained through their nderinsurance coverage: $300,000. *Id.* at 522-523. *See also Royal Ins Co v Cole*, 13 Cal App h 880; 16 Cal Rptr 2d 660 (1993)(finding that the purpose of the California statute was not to crease the pool of insurance available to an injured policyholder merely because the olicyholder cannot collect his or her actual damages from the liability coverage afforded by the rtfeasor's policy).

An identical analysis was used by the Superior Court of Connecticut in *Trzaskos v State arm Mut Automobile Ins Co*, 28 Conn L Rptr 480; 2000 WL 1889726 (2000). In *Trzaskos*, ree parties made claims for injuries under the tortfeasor's liability insurance, which provided r coverage of $50,000 per person and $100,000 per accident. The $100,000 limits were xhausted before the damages of the injured parties were compensated fully. Two of the parties en made claims for underinsured motorist benefits under a policy issued by State Farm, which ovided for underinsured motorist coverage limits of $50,000 per person and $100,000 per cident. The claimants asserted they were entitled to underinsurance benefits because they had ot actually received the full amount of the limits available in the tortfeasor's policy. The onnecticut court rejected this analysis, holding:

> The purpose of underinsured motorist coverage is to "put the injured party in the same position - no worse and no better - that the party would have been in had the tortfeasor carried liability insurance equal to or more than the amount of underinsured motorist coverage available to the injured party." *Doyle v Metropolitan Property & Casualty Ins Co*, 252 Conn 79, 88; 743 A2d 156 (2000). Ordinarily, to calculate whether a party is underinsured, the court should make a "simple comparison - of potentially available liability insurance with potentially available underinsured motorist coverage ... irrespective of whether the liability coverage had been fully or partially exhausted by other claimants, irrespective of whether the coverage included a split or single limit, and irrespective of the motivation of the plaintiff in either purchasing the underinsured motorist coverage or seeking to recover under it." *Id.*
>
> ***
>
> Finally, under the court's interpretation, each plaintiff is put "in the same position – no worse and no better - that the party would have been in had the tortfeasor carried liability insurance equal to or more than the amount of underinsured motorist coverage available to the injured party." *Id.* Even under State Farm's underinsured motorist coverage, each plaintiff's potential $50,000 recovery would be limited by the possibility that multiple claimants would use some or all of the $100,000 per accident coverage. The situation is no different under the tortfeasor's liability policy. Accordingly, the court holds that the plaintiffs are not entitled to coverage under State Farm's underinsured motorist coverage.

l., 2000 WL 1889726 (2000). *See also*, *Moreno v American Family Mut Ins Co*, 238 Wis 2d 42; 618 NW2d 274 (Wis App, 2000)(holding that multiple claimants are placed in the same osition as if the underinsured had liability limits equal to the insured's coverage when the omparison is between the limits of the two policies); *Score v American Family Motor Ins Co*, 38 NW2d 206, 208 (ND, 1995)(holding that in some cases with multiple claimants to a ›verage limit, some claims would be less than fully compensated).

While the Michigan Legislature recognized that there would be circumstances after the o-Fault Act was adopted when tort judgments would not be fully insured, it did not put a safety ɜt into place for non-economic loss by mandating a minimum recovery for underinsured .otorist benefits, or by instructing courts to seek to invalidate clauses expressly limiting an .surer's liability for underinsured benefits. This Court similarly should not do so. *Wojewoda v nployment Sec Comm*, 357 Mich 374, 379; 98 NW2d 590 (1959)(courts are not authorized to ıss upon the wisdom, policy or equity of legislation).

Furthermore, the interpretation of the Auto-Owners' endorsement consistent with its ain language is supported by valid public policy reasons. The claimant receives the potential recovering limits equal to the amount the policyholder believes the tortfeasor should have ırchased. Like every other claimant against a tortfeasor, however, the policyholder runs the sk that multiple claimants will reduce or exhaust the amount of the tortfeasor's liability limits ɜfore the policyholder is fully compensated.

It should be noted that the interpretation adopted by the Court of Appeals is ripe for omoting collusion and abuse by policyholders. Where there are multiple claimants to a ability policy with inadequate limits, the claimants could shuffle the distribution of the liability mits among themselves in a manner that increases the amount that must be paid by the ıderinsured carrier, even though the agreed-upon distribution may not be supported by the .cts. The plain language of the endorsement here eliminates this possibility, by making the ɜtermination of the maximum amount payable by the insurer dependent on the difference in nits between the two policies, not on the shuffling of liability payments among those persons jured by the tortfeasor.

I. THE DOCTRINE OF REASONABLE EXPECTATIONS IS NOT A SOUND PRINCIPLE OF CONTRACT LAW AND SHOULD BE REJECTED. IN THE EVENT THAT THE DOCTRINE IS RETAINED IN MICHIGAN, IT SHOULD BE APPLIED ONLY AFTER A FINDING IS MADE BY THE COURT THAT THE CONTRACT AT ISSUE IS AMBIGUOUS.

Introduction

The Court has asked the parties to brief the issue whether the "rule of reasonable :pectations is a sound principle of contract law." The Court has asked the parties to further ldress whether the "rule of reasonable expectations" can be applied "independent of a finding `ambiguity." In response to these questions, Auto-Owners submits that upon close :amination, the "reasonable expectations doctrine" is an unnecessary, superfluous doctrine ven the abundance of contractual interpretation tools that already exist in Michigan to resolve ıntractual disputes. The doctrine has generated confusion and inconsistencies in Michigan and sewhere, and created results contrary to the fundamental principle that parties may contract garding the scope of the coverage of an insurance policy within the confines of Michigan law. the Court disagrees and retains the rule of reasonable expectations, it should not be applied dependent of a finding of ambiguity in the language of an insurance policy.

A. History of the Doctrine

1. The Doctrine Emerges.

The notion that the reasonable expectations of the insured should be honored ›twithstanding the content of the insurance policy at issue is the result of Professor (now Judge) eeton's attempt to reconcile perceptible discrepancies between the dictates of insurance policy nguage and the outcomes of disputes between insurers and insureds. Toward that end, ofessor Keeton undertook an empirical and normative study of a number of cases that appeared defy the well-known principle that contracts will be construed by the judiciary in accordance th their unambiguous terms.

Following his examination of the cases at issue, Professor Keeton determined that the tcomes were not anomalous; but rather the results in those cases were the consequence of an formal and apparently spontaneous principle of law upon which the trial courts were relying to fect an outcome favorable to insureds. Professor Keeton gave the principle legitimacy by ling it as the "doctrine of reasonable expectations," and summarized the newly founded ctrine as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provision would have negated those expectations.

bert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part One*, 83 Harv Rev 961, 967 (1970). Professor Keeton's doctrine undeniably represents a radical departure m traditional contract interpretation. Professor Rahdert notes:

> The Keeton formula suggests that an insured can have reasonable expectations of coverage that arise from some source other than the policy language itself, and that such an extrinsic expectation can be powerful enough to override any policy provisions no matter how clear. So interpreted, the Keeton formula pushes insurance law in a dramatic new direction, one that discards the traditional contract premise that a written agreement is the controlling code for determining the parties' rights and duties.

ark C. Rahdert, *Reasonable Expectations Reconsidered*, 5 Conn Ins J 323, 329 (1986).

2. Lukewarm Reception of the Doctrine by the Judiciary

Although the doctrine was ostensibly founded upon a principle that, in Keeton's view, d proven to be widely accepted by many courts nationwide, the doctrine met with mixed ction from the judiciary. While some jurisdictions adopted the doctrine as enunciated by ofessor Keeton,[9] the general trend among courts has been to reject Keeton's analysis or ignore e doctrine altogether.[10] Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance*

Alaska: *Stordahl v Govt Employees Ins Co*, 564 P2d 63, 66 (Alaska, 1977); *Farquhar v Alaska Nat Ins Co*, 20 P3d 577, 579 (Alaska, 2001); **Arizona**: *Phila Indemn Ins Co v Barerra*, 200 Ariz 9, 16-17; 21 P3d 395 (2001)(citing *Darner Motor Sales v Universal Underwriters Ins Co*, 140 Ariz 383; 682 P2d 388 (1984)); **California**: *Smith v Westland Life Ins Co*, 15 Cal 3d 111, 122; 539 P2d 433 (1975); *AIU Ins Co v Superior Ct*, 51 Cal 3d 807, 799 P2d 1253 (1990); **Iowa**: *C & J Fertilizer, Inc v Allied Mut Ins Co*, 227 NW2d 169, 176 (Iow, 1975); *Monroe County v International Ins Co*, 609 NW2d 522, 526 (2000); **Montana**: *Transamerica Ins Co v Royle*, 202 Mont 173, 180-81; 656 P2d 820 (1983); *Bennett v State Farm Mut Auto Ins Co*, 261 Mont 386, 390; 862 P.2d 1146 (1993); **Nebraska**: *Nile Valley Coop Grain & Milling Co v Farmers Elevator Mut Ins Co*, 187 Neb 720; 193 NW2d 752 (1972); **Nevada**: *Sullivan v Dairyland Ins Co*, 98 Nev 364; 649 P2d 1357 (1982); *National Union Fire Ins Co v Reno's Executive Air*, 100 Nev. 360; 682 P2d 1380, 1383 (1984); **New Hampshire**: *Atwood v Hartford Accident & Indem Co*, 116 NH 636, 637; 365 A2d 744 (1976); *Lariviere v New Hampshire Ins Group*, 120 NH 168, 172; 413 A2d 309 (1980); **New Jersey**: *Werner Indus, Inc v First State Ins Co*, 112 NJ 30; 548 A2d 188, 191 (1988); *Progressive Cas Ins Co v Hurley*, 166 NJ 260; 765 A2d 195, 202 (2001); **Pennsylvania**: *Tonkovic v State Farm Mut Auto Ins Co*, 513 Pa 445, 456; 521 A2d 920 (1987); *Cf. Madison Constr Co v Harleysville Mu. Ins Co*, 557 Pa 595, 611; 735 A2d 100 (1999) (holding that doctrine has been applied in Pennsylvania only "in very limited circumstances."); **North Carolina**: *Silvers v Horace Mann Ins Co*, 324 NC 289, 299; 378 SE2d 21, 27 (1989); **Colorado**: *State Farm Mut Auto Ins Co v Nissen*, 851 P2d 165, 167-68 (1993); **Hawaii**: *Fortune v Wong*, 68 Haw 1, 10-11; 702 P2d 299, 306 (1985); *Hawaiian Ins & Guar Co v Financial Sec Ins Co*, 72 Haw 80; 807 P2d 1256 (1991).

Rejecting Jurisdictions: **Idaho**: *Casey v Highlands Ins Co*, 100 Idaho 505, 509; 600 P2d 1387, 1391 (1979); *Ryals v State Farm Mut Auto Ins Co*, 134 Idaho 302, 304; 1 P3d 803 (2000); **Illinois**: *Bain v Benefit Trust Life Ins Co*, 123 Ill App 3d 1025, 1032; 463 NE2d 1082, 1086 (1984); *Insurance Co of North America v Adkisson*, 121 Ill App 3d 224; 459 NE2d 310 . (1984); **North Dakota**: *Walle Mut Ins Co v Sweeney*, 419 NW2d 176, 181 n 4 (ND, 1988); *RLI Ins Co v Heling*, 520 NW2d 849, 855 (ND, 1994); **Ohio**: *Sterling Merchandise Co v Hartford Ins Co*, 30 Ohio App 3d 131, 135; 506 NE2d 1192, 1196-97 (1986); **South Carolina**: *Gambrell v Travelers Ins Cos*, 280 SC 69, 71; 310 SE 2d 814, 816 (1983); *Allstate Ins Co v Mangum*, 299 SC 226, 231; 383 SE2d 464, 467 (1989); **Washington**: *Keenan v Industrial Indem Ins Co of Northwest*, 108 Wash 2d 314, 322; 738 P2d 270, 275 (1987); *questioned on other grounds*, *Price v Farmers Ins Co*, 133 Wash 2d 490, 500; 946 P2d 388, 393 (1997); *State Farm Gen Ins Co v Emerson*, 102 Wn2d 477, 485; 687 P2d 1139 (1984); **Wyoming**: *St Paul Fire & Marine Ins Co Albany County Sch Dis*, 763 P2d 1255, 1263 (Wyo, 1988); **Utah**: *Allen v Prudential Property & Casualty Ins Co*, 839 P2d 798, 805 (1992) ("Taken as a whole, these cases show our unwillingness to alter fundamentally the terms of insurance policies in the absence of legislative direction. They also show the consequent uneasiness of a majority of this court with the notion of a reasonable expectations doctrine. Today we again affirm the principle of deferring to legislative policy in considering the facial validity of insurance provisions."); **Florida**: *Deni Assocs v State Farm Fire & Cas Ins Co*, 711 So 2d 1135, 1140 (Fla 1998)("We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are ıw *Doctrine of Reasonable Expectations*, 35 Tort & Ins L J 729, 779 (2000)("[M]ost curiously, ter more than thirty years of contentious debate – a majority of states still have not expressly lopted, or expressly rejected, the Keeton doctrine of reasonable expectations, and apparently ıve chosen to ignore this jurisprudential brouhaha."); Kenneth S. Abraham, *The Expectations ·inciple as a Regulative Ideal*, 5 Conn Ins LJ 59, 60 (1998-1999)("For over three decades now, e courts of some states have followed the doctrine permitting them to honor the reasonable pectations of the insured to coverage, notwithstanding clear policy language to the contrary. ost courts, however, have either expressly rejected this doctrine or quietly ignore it.")[11] As a

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charged."). Unsettled Jurisdictions: **Rhode Island**: *American Universal Ins Co v Russell*, 490 A2d 60, 62 (RI, 1985); **Oregon**: *Collins v Farmers Ins Co*, 312 Ore 337, 365; 822 P2d 1146 (1991); **Mississippi:** *Brown v Blue Cross & Blue Shield of Miss*, 427 So 2d 139 (Miss, 1983); *Bland v Bland*, 629 So 2d 582, 589 (Miss, 1993); **Maryland**: *Mayor & City Council of Baltimore v Utica Mut Ins Co*, 145 Md App 256, 301, n 46; 802 A2d 1070 (2002) (holding that the rules of construction apply to insurance contracts just like any other contract); *Callaway v MAMSI Life & Health Ins Co*, 806 A2d 274 (Md, 2002) (noting that "Maryland does not subscribe to the doctrine that insurance contracts are automatically construed "most strongly against the insurer."); **New York**: *Baughman v Merchants Mut Ins Co*, 87 NY2d 589, 593; 663 NE2d 898 (NY App, 1996)(considering expectations and purpose in construing business policy.); **South Dakota**: *Dakota, Minn & E RR Corp v Heritage Mut Ins Co*, 2002 SD 7, 17; 639 NW2d 513, 519 (2002); *American Family Mut Ins Co v Elliot*, 523 NW2d 100, 103 (SD, 1994) ("This Court expresses no opinion whether the doctrine of reasonable expectations would govern construction of an insurance contract if the terms of that contract were ambiguous, or may otherwise lead a policyholder to reasonably, but incorrectly, conclude that coverage existed."); **Texas**: *Bristol-Myers Squibb Co v Highlands Ins Co*, 1997 Tex App LEXIS 5725, p. 5 (Tex App, 1997)(unpublished) ("As a part of the argument under their ambiguity point, appellants urge us to employ the 'reasonable expectations doctrine,' declaring that it is a doctrine Texas courts have recognized. Regardless of whether that doctrine is recognized or otherwise applicable, we have held appellants' avowed expectations were not reasonable."); **Vermont**: *State Farm Mut Auto Ins Co v Roberts*, 166 Vt 452, 461; 697 A2d 667, 672 (1997); **Virginia**: *Partnership Umbrella, Inc v Federal Ins Co*, 260 Va 123, 133; 530 SE2d 154, 160 (2000); **Tennessee**: *Employees Trust Fund v Graves*, 1999 Tenn App LEXIS 802, *13 (Tenn App, 1997)(unpublished) ("Accordingly, the courts should construe an insurance policy keeping in mind the 'understanding and reasonable expectations of the average insurance policyholder,' *Harrell v Minnesota Mut Life Ins Co*, 937 SW2d 809, 810 (Tenn, 1996), rather than the more sophisticated understanding of a 'Philadelphia lawyer.' *Paul v. Ins Co of N Am*, 675 SW2d 481, 484 (Tenn App, 1984)."); **Missouri**: *Rodriguez v General Accid Ins Co*, 808 SW2d 379, 381-82 (Mo, 1991) ("Thus, this Court has not determined the viability of the objective reasonable expectations doctrine in Missouri.").

Professor Swisher notes that the Florida Supreme Court's rejection of the doctrine in *Deni Associates of Florida, Inc v State Farm Fire & Cas Ins Co*, 711 So 2d 1135 (Fla, sult of the judiciary's unenthusiastic reception of the doctrine, Professor Abraham concludes at "[t]he doctrine is not an important feature on the landscape of insurance law." Abraham, *A gulative Ideal* at 63.

Of those jurisdictions to which Keeton's reasoning appeals, many have rejected the ctrine in its pure form, and instead developed numerous modifications to the doctrine. Such odifications to the doctrine have been recognized as a source of confusion regarding the both e substantive content and proper application of the doctrine: "[D]espite the apparent simplicity Professor Keeton's words, courts seeking to apply them have created a patchwork of rules that e impossible to harmonize and, in many instances, virtually unrecognizable as the progeny of ofessor Keeton's formulation." Susan M. Popik and Carol D. Quackenbos, *Reasonable pectations After Thirty Years: A Failed Doctrine*, 5 Conn Ins L J 425, 427-28 (1998-1999).

Jurisdictions that have modified the doctrine of reasonable expectations fall into two oad categories. Some jurisdictions apply the doctrine only to resolve an identifiable nbiguity in the policy;[12] others apply the doctrine only where the policy language at issue is so

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1998) is indicative of the "current legal trend in American jurisdictions today of severely restricting – or expressly rejecting – the Keeton reasonable expectations doctrine." 35 Tort & Ins L J 729, 779.

Alabama: *State Farm Fire & Cas Co v Slade*, 747 So 2d 293, 312 (Ala, 1999); **Massachusetts**: *Hazen Paper Co v United States Fidelity & Guar Co*, 407 Mass 689; 555 NE2d 576 (1990); *Hanover Ins Co v Shedd*, 424 Mass 399, 403; 676 NE2d 835, 838 (1997); **Connecticut**: *Simses v North American Co for Life & Health Ins*, 175 Conn 77, 84; 394 A2d 710 (1978); *Ceci v National Indem Co*, 225 Conn 165, 175 n. 6; 622 A2d 545, 550 (1993); **Georgia**: *Richards v Hanover Ins Co*, 250 Ga 613, 614; 299 SE2d 561 (1983); *Boardman Petroleum v Federated Mut Ins Co*, 269 Ga 326, 328; 498 SE2d 492 (1998); **Indiana**: *Eli Lilly & Co v Home Ins Co*, 482 NE2d 467, 470 (Ind, 1985); *Bosecker v Westfield Ins Co*, 724 NE2d 241, 243-44 (Ind, 2000); **Kansas**: *Gowing v Great Plains Mut Ins Co*, 207 Kan 78, 82; 483 P2d 1072, 1076 (1971); *First Fin Ins Co v Bugg*, 265 Kan 690, 694; 962 P2d 515, 519-20 (1998); **Kentucky**: *Simon v Continental Ins Co*, 724 SW2d 210, 213 (Ky, 1986); *Phildelphia Indem Ins Co v Morris*, 990 SW2d 621, 625 (Ky, 1999); **Louisiana**: *Louisiana Ins Guar Ass'n v Interstate Fire & Casualty Co*, 630 So 2d 759, 764 (La, 1994); **Maine**: *Baybutt Constr Corp v Commercial Union Ins Co*, 455 A2d 914, 921 (Me, 1983); *Colford v Chubb Life Ins Co of Am*, 687 A2d 609, 614 (Me, 1996); **New Mexico**: *Rummel v St Paul Surplus Lines Ins Co*, 123 NM 767, 770; 945 P2d 985 (1997); **Wisconsin**: *Garriguenc v Love*, 67 Wis 2d 130, 134-35; 226

ıclear or obscure that the insured is not expected to understand and/or discover it.[13]

3. Michigan's Use of the Doctrine of Reasonable Expectations

The doctrine of reasonable expectations has a confusing and tortured history in Michigan. ıe first case referencing the "reasonable expectations" of the insured was *Zurich Ins Co v ›mbough*, 384 Mich 228, 232-233; 180 NW2d 775 (1970), where the Court cited with approval e California case of *Gray v Zurich Ins Co*, 65 Cal 2d 263; 419 P2d 168 (1966), that referenced e expectations of policyholders when determining the proper interpretation of an ambiguous ntract. Professor Keaton's article was then cited by the Court in *Bradley v Mid-Century Ins, pra*, where the Court invalidated a clause setting off the insurer's obligation to pay no-fault nefits against the policy limits of uninsured motorist protection. The Court noted that the set-f clause, whether regarded as ambiguous or inconsistent with reasonable expectations of the sured, could not be enforced under the no-fault act. *Id.* at pp 60-61. Intervening courts dressed the "reasonable expectations" doctrine in a variety of permutations, reflecting nfusion in the courts as to when the doctrine properly applied. This confusion was typified by e plurality decision in *Powers v DAIIE*, 427 Mich 602; 398 NW2d 411 (1986), where the

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NW2d 414 (1975); *Danbeck v Am Family Mut Ins Co*, 245 Wis 2d 186, 193; 629 NW2d 150, 154 (2002); **Arkansas**: *Toney v Shelter Mut Ins Co*, 1989 Ark App LEXIS 384, *6-7 (Ark App, 1989)(unpublished)("Courts are to resolve ambiguities in insurance policies in accordance with the reasonable expectations of the insured.")(citing *Enterprise Tools, Inc v Export-Import Bank of the United States*, 799 F2d 437 (CA8, 1986), *cert den,* 480 US 931 (1987)).
Delaware: *Hallowell v State Farm Mut Auto Ins Co*, 443 A2d 925, 928-29 (Del, 1981); *but see O'Brien v Progressive Ins Co*, 785 A2d 281, 288 (Del, 2001) (citing to *Hallowell* for the proposition that ambiguities are construed against the insurer); **Oklahoma**: *Max True Plastering Co v US Fidelity & Guar Co*, 912 P2d 861, 868 (Okla 1996); **Minnesota**: *Board of Regents of the University of Minn v Royal Ins Co of America*, 517 NW2d 888, 891 (Minn, 1994); *Atwater Creamery Co v Western Nat'l Mut Ins Co*, 366 NW2d 271 (Minn 1985); **West Virginia**: *National Mut Ins Co v McMahon & Sons*, 177 W Va 734, 742; 356 SE2d 488, 496 (1987), *overruled on other grounds, Potesta v United States Fid & Guar Co*, 202 W Va 308, 316; 504 SE2d 135, 143 (1998); *Consolidation Coal Co v Boston Old Colony Ins Co*, 203 W Va 385, 392; 508 SE2d 102, 109 (1998).

ırality decision noted in a footnote that a finding of ambiguity was not a prerequisite to the plication of the doctrine. 427 Mich at 631, n 7.

Following the *Powers* decision, the Michigan courts then adopted a modified version of e reasonable expectations doctrine in *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 991). In *Vanguard*, the Court held that the rule of reasonable expectation comprises "a[n] junct to the rules of construction of insurance contracts," citing to *Powers*. The Court odified the doctrine, however, by noting that from an objective standpoint, the "language of the surance policy itself provides the best answer" as to what the insured reasonably should expect ıen the language is unambiguous. *Id.* at 472-73. In *Nikkel, supra*, 460 Mich 558, this Court pressly rejected the decision of the *Powers* plurality upon which *Vanguard* relied, holding that e plurality "improperly relied on the rule of reasonable expectations to defeat the unambiguous licy language." *Id.* at p 568. The Court then stated that the reasonable expectations rule does t apply when the policy language is unambiguous, citing to the holding in *Raska*, *supra*, that e "[e]xpectation that a contract will be enforceable other than according to its terms surely may t be said to be reasonable." *Id.* at p 569.

Following *Vanguard* and *Nikkel*, different panels of the Court of Appeals have reached fferent conclusions as to whether the rule of reasonable expectations can be applied in the sence of an ambiguity. *Cf. Citizens Ins Co v North Pointe Ins Co*, unreported opinion per riam of the Court of Appeals, decided August 4, 2000 (Docket No. 213036), 2000 WL 415010 (holding that if contract language is unambiguous, the reasonable expectations ctrine does not apply); and *McGill v Scottsdale Ins Co*, unreported opinion per curiam of the ourt of Appeals, decided April 26, 2002 (Docket No. 227525), 2002 WL 867738 (stating that it ıs bound to follow *Vanguard*, but expressing the view that the doctrine should apply only if the ıguage is unambiguous, notwithstanding that opinion); and *Singer v American States Ins*, 245 ich App 370, 382, n8; 631 NW2d 34 (2001), *lv den*, 649 NW2d 74 (2002) (same as *McGill*).

All of this highlights that while Michigan follows a modified version of Professor ɜeton's "reasonable expectations" doctrine, the lower courts are confused as to the proper ticulation and scope of the doctrine.

B. This Court Should Reject The Doctrine of Reasonable Expectations Because The Doctrine Is Unnecessary Given the Traditional Contract Interpretation Principles Applied To Insurance Contracts.

Professor Keeton's theory was developed as a way to explain anomalous results that he served in reported decisions across the country. The issue whether the "reasonable pectations" doctrine serves as a valid principle of contract interpretation boils down to whether ɜ doctrine adds anything to Michigan law, or whether it is simply a different label placed on ɜ contractual interpretation rules that already exist in Michigan law. Auto-Owners submits that ʼariety of contractual interpretation rules that apply to insurance contracts already fully protect ɜureds from policy language that is ambiguous or that violates public policy. Each of these nedies is addressed in detail below.

1. Insureds Are Protected Against Ambiguities In Their Policies Without The Reasonable Expectations Doctrine

One of the most frequent applications of the reasonable expectations doctrine occurs ıen the Court determines that an ambiguity exists in an insurance contract. Yet Michigan has ıple contract interpretation rules that apply with equal force to insurance contracts that can ɔtect the "reasonable expectations" of the insured (assuming such can be divined).[14] There are

As one commentator has noted, the doctrine assumes that an insured read his policy and formed a specific expectation, and then rationally assessed this information. If this did not happen, the determination of "reasonable expectations" "in many cases, is a fiction that allows them [the courts] to impose their own view of fairness. This might be acceptable if courts could determine "fairness" in some objective, consistent way, but o co-extensive rules of construction on which Michigan relies to resolve identified ambiguities a contract.[15] The primary purpose of the court in construing the contract is to effectuate the :ent of the parties. *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994). ıe law presumes that the parties to a contract understand its import and that their intention is ınifested by its terms. *Zurich Ins Co v CCR & Co*, 226 Mich App 599, 603-604; 576 NW2d 2 (1999)(citing *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941). ›wever, where the intention of the parties cannot be gleaned from the contract itself, the court ll also inquire into the subject matter of the contract and the circumstances surrounding the ıking of the contract. *Remes v City of Holland*, 147 Mich App 550, 555; 382 NW2d 819 985).

Where a review of the extrinsic evidence fails to resolve the ambiguity, Michigan courts sort to the well-known legal tenant that contractual ambiguities shall be construed against the ıfter of the contract. *Ladd v Teichman*, 359 Mich 587, 592; 103 NW2d 338 (1960); *Bonney v tizens Mut Auto Ins Co*, 333 Mich 435, 438; 53 NW2d 321 (1952). Insurance contracts are not cepted from this rule. In *Raska v Farm Bureau Mut Ins Co, supra*, 412 Mich at 362 (1982), s Court wrote:

> If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no

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one's view of fairness is greatly influenced by individual experience and perspective." Jeffrey E. Thomas, *An Interdiciplinary Critique of the Reasonable Expectations Doctrine*, 5 Conn Ins L J 295, 324 (1998).

Auto-Owners is cognizant of the fact that this Court has granted leave to appeal in *Klapp v United Insurance Group Agency*, Docket Number 119175-6, and that the issues pertinent to that case involve the question whether the application of the rules of construction commonly employed by Michigan courts to resolve ambiguities should involve an examination of extrinsic evidence and the appropriateness of construing ambiguities against their drafter. Regardless of how the Court ultimately resolves the issues raised in *Klapp*, however, the rules applicable to the interpretation of contracts can be applied by the courts to resolve disputes arising from ambiguous policy provisions.

coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.

2 Mich at 362.

The practical effect of applying the reasonable expectations doctrine to disputed, ıbiguous policy language is the same as simply applying these rules of contract interpretation. ɔcause insurance contracts commonly are construed against the drafter once an ambiguity is und, the insured's interpretation of the policy generally controls. The result under Michigan's proach to the reasonable expectations doctrine is not substantively different. Where an ıbiguity is identified, the interpretation advocated by the insured (his or her "reasonable pectations") controls. By necessity, any "reasonable" expectation of the insured must be ɔunded upon a reasonable interpretation of the provision at issue. *Raska*, 412 Mich at 362- .[16] Thus, under either the reasonable expectations doctrine or the rules of contract ɛrpretation, the result is the same: the reasonable interpretation of the insured will generally ɘvail where a contract is ambiguous. The Court of Appeals noted the duplication of the ctrines in *Singer*, *supra*, when it stated:

> Furthermore, we have considerable doubt regarding the usefulness and logic of examining what plaintiff could reasonably expect in order to interpret the policy. Well-settled principles of contract interpretation require one to first look to a contract's plain language. If the plain language is clear, there can be only one reasonable interpretation of its meaning and, therefore, only one meaning the parties could reasonably expect to apply. If the language is ambiguous, long-standing principles of contract law require that the ambiguous provision be construed against the drafter. Applied in an insurance context, the drafter is always the insurer. Thus, it appears that the 'rule of reasonable expectations' is nothing more than a unique title given to traditional contract principles applied to insurance contracts, notwithstanding the

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See also, Darner Motor Sales, Inc v Universal Underwriters Ins Co, 140 Airz 383; 682 P2d 388, 395 (1984)(noting that the insured's reasonable expectations must be based on "something more than the fervent hope usually engendered by a loss.").

Supreme Court's conclusion in *Vanguard Ins Co* that an insured's 'reasonable expectations' can override the terms of an otherwise ambiguous insurance contract."

nger, 245 Mich App at 381, n 8; *see also, McGill, supra*, 2002 WL 867738, *3; *A Failed ɔctrine, supra*, 5 Conn Ins L J at 429 ("Courts and commentators have noted that the nbiguity-based variation of the reasonable expectations doctrine is in reality *contra oferentem* by another name. . . Courts applying an 'ambiguity' - based version of the doctrine .ve apparently abandoned the doctrine as a rule of substantive law altogether, treating it instead a rule of construction analogous to -- indeed, virtually indistinguishable from -- the *contra oferentem* doctrine."); Roger C. Henderson, *The Doctrine of Reasonable Expectations in surance Law After Two Decades*, 51 Ohio LJ 823, 827 (1990) ("It is doubtful whether plication of [the ambiguity-based] version of the reasonable expectations doctrine can be stinguished from, or adds anything to, the application of the canon of construction resolving ıbiguities against the drafter and reforming the contract accordingly.").

The fact that the reasonable expectations of the insured are taken into consideration under ıth the rules of construction and the reasonable expectations doctrine does not serve as a stification for retaining the doctrine. To the contrary, the fact that the rules and the doctrine 'erlap to such a significant extent compels the conclusion that the doctrine should be abolished avoid confusion. The Florida Supreme Court reached this conclusion in *Deni Assocs of orida, Inc v State Farm Fire & Casualty Ins Co*, 711 So 2d 1135 (Fla, 1998), when it held:

> We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which premiums are charged. See <u>Sterling Merchandise Co. v. Hartford Ins. Co.</u>, 30 Ohio App. 3d 131, 506 N.E.2d 1192, 1197 (1986)("[T]he reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done

> regardless of the bargain entered into by the parties to the contract.").
>
> Construing insurance policies upon a determination as to whether the insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation. As noted in Allen v. Prudential Property & Casualty Insurance Co., 839 P.2d 798, 803 (Utah 1992):
>
>> Today, after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application.

., 711 So 2d at 1140 (footnote omitted).

Given the illusory protection offered by the reasonable expectations doctrine, its ntinued existence in Michigan as an interpretative doctrine only increases the confusion among e lower courts as to its applicability.

2. Insureds Are Protected Against Insurance Contracts That Violate The Expressed Public Policy of Michigan Without The Reasonable Expectations Doctrine.

Michigan courts are also equipped with the ability to void a contractual provision where at provision is contrary to law and the public policy of this State. Thus, where an unambiguous ovision is inconsistent with the requirements imposed by the Legislature in the insurance code another Michigan statute, courts have held that it is appropriate to invalidate the provision in ference to public policy. As this Court recently explained in *Cruz v State Farm Mut Auto Ins*), 466 Mich 588, 599; 648 NW2d 591 (2002):

> Our approach is premised on the doctrine that contracting parties are assumed to want their contract to be valid and enforceable. Accordingly, we are obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute.

6 Mich at 599. At issue in *Cruz* was a provision in a no-fault policy that conditioned the surer's duty to pay no-fault benefits upon the insured's submission to an examination under th ("EUO"). The Court found that the no-fault statute prohibits an insurer from requiring an JO as a condition precedent to the payment of benefits; however, in recognition of the fact that JO is an effective instrument for detecting insurance fraud, the Court found that EUOs are not ıpermissible per se. In so doing, the Court construed the provision in question in such a way ıt the provision was consistent with the dictates of the no-fault act.

The public policy doctrine is a flexible and constructive judicial mechanism that is pable both of reformation of an agreement to render it compliant with state law, and of validation where reformation is not possible. No insured reasonably should expect more otection or coverage than that specified by the Legislature, and continued existence of the ctrine of reasonable expectations is unnecessary for enforcement of Michigan public policy.

C. There Is No Sound Jurisprudential Or Policy Reason To Use The Reasonable Expectations Doctrine When Interpreting Unambiguous Policy Language.

As described above, the doctrine of reasonable expectations is an unnecessary component Michigan law regardless whether the contract at issue is ambiguous. Although its superfluous ture alone is sufficient cause to reject the doctrine in Michigan, there are additional compelling asons to abandon the doctrine, particularly when the insurance policy contains unambiguous iguage. As a result, if the Court elects to continue the use of the reasonable expectations ctrine in some form, it should apply it only in those cases where a court first determines that e policy language is ambiguous.

1. **Use Of The Reasonable Expectations Doctrine Independent Of A Finding Of Ambiguity Disrupts The Balance of Powers.**

The doctrine of reasonable expectations is ripe for rejection in Michigan because plication by the judiciary of any version of the doctrine to insurance disputes impermissibly trudes on the executive and legislative branches of government. As a journal article on the bject notes: "One of the chief vices of the reasonable expectations doctrine is that it turns ery court into a mini-legislature, with the power to fashion public policy by invalidating ntract terms it believes to be unfair or inappropriate." Popik and Quackenbos, *A Failed ɔctrine*, 5 Conn Ins LJ at 432.

Transformation of the judiciary into a "mini-legislature" is clearly violative of the notion separation of powers. The doctrine of separation of powers is expressly set forth in the ichigan Constitution:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

ɔnst 1963, art 3, § 2. The fundamental principles upon which the doctrine is founded are well ıown to this Court:

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

therland v Governor, 29 Mich 320, 324 (1874). *See also, Lee v Macomb County Bd of ɔmm'rs*, 464 Mich 726; 737-738, 629 NW2d 900 (2001).

This Court has applied these principles in numerous instances, and has curtailed trial urts that have strayed into the domain of the legislative and/or executive branches. For ample, in *People v Sierb*, 456 Mich 519; 581 NW2d 219 (1998), the Court determined that the al court had violated the separation of powers principle in dismissing charges against a fendant over the prosecutor's objection. The defendant had been tried twice, and both trials sulted in mistrials. The trial court thereafter dismissed the charges, citing to the financial and notional impact associated with trying the case for a third time. This Court reversed, finding at the trial court had intruded on the law enforcement function of the executive branch, and rther noting the Court's skepticism that the judiciary is armed with "the authority or the sdom to monitor the performance of the elected prosecutor." 456 Mich at 533.

Similarly, in *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986), the Court ndemned the trial court's adoption of its own rezoning proposal in lieu of proposals offered by e landowner and the defendant city. This Court held that the trial court's ruling violated the paration of powers principle because zoning is a legislative, rather than judicial function:

> The role of the Court is not to control the direction of zoning. It is not to determine what is the best use of the land. Our role is to prevent the abuse of the zoning power -- as when the ordinance in question so restricts the use of land that it amounts to confiscation by the local government.
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> * * *
>
> Zoning is a legislative function that cannot constitutionally be performed by a court, either directly or indirectly -- in law or in equity.

6 Mich at 307 (citing dissent in *Daraban v Redford Twp*, 383 Mich 497, 502-503; 176 NW2d 8 (1970)).

More recently, in *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733)01), this Court encountered the issue whether the doctrine of primary jurisdiction constitutes a fense in a subrogation claim involving a public utility. In examining the issue, the Court noted ıt a significant consideration in deciding matters that may impinge on the jurisdiction of any gislatively created entity "relates to respect for the separation of powers and the statutory rpose underlying the creation of the administrative agency, the powers granted to it by the gislature, and the powers withheld." *Travelers*, 465 Mich at 199 (citation omitted). The Court rther noted that the goal of conservation of judicial resources is well served by judicial straint:

> Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can be better resolved by the agency.

at 197. The reasonable expectations doctrine and the issues implicated therein are admittedly stinct from questions concerning the primary jurisdiction doctrine; however, the reasoning set rth in *Travelers* is instructive in this case. Simply stated, the Court has recognized that there is ine of demarcation over which the judiciary should not tread where the Legislature properly s vested extensive regulatory powers in a legislatively created agency that possesses expertise ncerning the issues in dispute.

The business of insurance is heavily regulated by the Michigan Legislature and the ecutive Branch. The Michigan Legislature created an Insurance Bureau and vested in the mmissioner of the Bureau[17] the explicit responsibility for regulating the insurance industry. *e, e.g.*, MCL 500.200. The Legislature granted the Commissioner broad powers to issue

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Executive Order 2000-4 shifted the Commissioner of Insurance to the Commissioner of the Office of Financial and Insurance Services ("OFIS"). Although the titles have changed as a result of the Executive Order, the functions have not.

lers and enact regulations toward the end of discharging his or her duties. MCL 500.205, CL 500.210. Insurers are statutorily proscribed from transacting business in the state without st obtaining a certificate of authority from the Commissioner. MCL 500.402. Toward that d, the Legislature specifically requires that all "insurance policy form(s)" be filed with the mmissioner for review. MCL 500.2236(1). The Legislature further specifically empowered Commissioner with the ability to "disprove, withdraw approval or prohibit the issuance, vertising or delivery of any form to any person in this state if it violates any provisions of this t, ***or contains inconsistent, ambiguous or misleading clauses, or contains exceptions and nditions that unreasonably or deceptively affect the risk purported to be assumed in the neral coverage of the policy***." (Emphasis added) MCL 500.2236(5).[18]

The Court has long-recognized the fact that the insurance industry and the proper nctioning of that industry are closely tied to public interest. In *Adams ex rel Balckford v ichigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961), the Court reiterated its mmitment to "give full effect to legislative efforts to regulate the business of insurance as it is rried on in this state." In this case, the Legislature explicitly has charged the Commissioner th the responsibility for reviewing policies of insurance to ensure that the provisions contained erein are not misleading or otherwise inconsistent with the insured's expectations. The mmissioner's inquiry is identical to the judicial inquiry contemplated by the doctrine of asonable expectations (e.g., determining if the insured anticipated the result mandated by the nguage of the policy at issue), thereby eliminating the utility of the doctrine.

Application of the doctrine of reasonable expectations in the context of insurance sputes necessarily intrudes upon the powers and responsibilities that the Legislature delegated the Commissioner, as it elevates a subjective "expectation" above the plain meaning of the

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The court recognized this function in *Cruz*, *supra*, 466 Mich at 599, n 15.

ıtutes and the language of insurance policies approved by the Commissioner.[19] Notably, where ; contract at issue is unambiguous and not void on public policy grounds, the application of the ısonable expectations doctrine is especially problematic, as it requires the judiciary further to :rude into the realm of the Legislature. As the Utah Supreme Court noted in rejecting the ısonable expectations doctrine:

> As a general matter, we are unwilling to make sweeping modifications in the public policy that underlies the regulation of the insurance industry in the absence of legislative direction. This approach is counseled by the active and preeminent role the legislative and executive branches have taken in this area. The legislative and executive branches' occupation of this field is evidenced by title 31A of the Code, which comprises the "Insurance Code" and sets out a comprehensive regulatory framework for the insurance industry. ... Thus, the validity of preprinted insurance contract is premised on executive approval, a regulatory mechanism that the Wagner [v Farmers Ins Exchange, 786 P2d 763 (Utah Ct App, 1990)] version of the reasonable expectations doctrine would largely undermine.

'len v Prudential Property & Cas Ins Co, 839 P2d 798, 804 (Utah, 1992). This Court should ach the same conclusion.

2. Use Of The Reasonable Expectations Doctrine When A Contract Is Unambiguous And Not Void On Public Policy Grounds Destroys The Predictability Of Results, Thereby Increasing The Cost Of Insurance To All Policyholders.

Under the doctrine of reasonable expectations, there is always the risk that an insurer will ; forced to absorb the loss associated with a risk that it did not intend to assume.[20] Holding an

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This substitution of judgment is all the more egregious given that the Commissioner possesses special knowledge and expertise concerning the insurance industry; the judiciary, although experienced in construing insurance policies, has no such expertise. The Commissioner should determine what policy forms are appropriate for use in this State, including whether a particular policy form satisfies the reasonable expectations of a policyholder regarding the scope of coverage offered by the form. *See*, e.g., *Travelers*, 465 Mich at 197-99.

Admittedly, this concern is most prevalent where courts are permitted to use the doctrine to circumvent unambiguous language in the policy. However, the concern is not abated by the prerequisite of ambiguity. The doctrine, in any form, is the consequence of urer liable for a risk it did not assume is not only unjust, *see, e.g., Nikkel*, 460 Mich at 568 ting *Auto-Owners v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992)), it is also unwise m a public policy perspective.

Application of the doctrine introduces an element of unpredictability into the process ich, from the perspective of the insurer that strives to spread the risk of loss among similarly uated insureds, creates uncertainty that must be reflecting in its pricing. In other words, if an urer cannot rely on its express exclusions or limits of liability, insurers will raise premiums to fray the cost of unanticipated claims or decline to provide certain types of coverages. Such a sponse potentially could cause a scarcity of particular types of coverage, and, even where the verage was available at an inflated price, would put the coverage out of reach for a segment of e population. The *Vanguard* Court recognized that such a result was undesirable, noting that en drafting an insurance policy, the drafters "calculate the probability of risk in setting the ice paid by the insured." *Vanguard, supra*, 438 Mich at 475. *See also*, *A Failed Doctrine, pra*, 5 Conn L J 425, 432 (1998); John Dwight Ingram, *The Insured's Expectations Should Be onored Only If They Are Reasonable*, 23 Wm. Mitchell L Rev 813, 836 (1997). Thus, rather an promoting the goals of the No-Fault Act to make insurance affordable and available,[21] the ctrine of reasonable expectations jeopardizes both goals.

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judicial activism with respect to the relationship between the insurer and the insured. One commentator noted that "judicial intervention has a retroactive effect. This creates a greater uncertainty, giving insurers no opportunity to react in a timely fashion to the changes in the legal environment. In contrast to the traditional rule's objectivity and certainty, inquiry into an insured's 'reasonable expectations' is highly subjective and uncertain." Stephen J. Ware, Comment: *A Critique of the Reasonable Expectations Doctrine*, 56 U Chi L Rev 1461, 1489 (1989).

Shavers v Attorney General, 402 Mich 554; 267 NW2d 72 (1978).

3. The Use Of The Reasonable Expectations Doctrine When There Is No Ambiguity In The Insurance Contract Violates The Rights Of The Parties To Contract Freely Within The Confines Established By The Legislature.

Michigan courts steadfastly have refused to interfere with unambiguous contract ɔvisions. *Cruz*, 466 Mich at 594 ("[W]here contract language is neither ambiguous, nor ntrary to the no-fault statute, the will of the parties, as reflected in their agreement, is to be rried out, and thus the contract is enforced as written."); *Lintern v Michigan Mut Liab Co*, 328 ich 1, 4; 43 NW2d 42 (1950); *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-07; 29 NW2d 2 (1947). Indeed, Michigan courts impose upon parties the duty to undertake contractual ligations seriously and responsibly, and consistently reject the notion that one can use one's ıorance of the terms of the agreement to escape enforcement or to create an ambiguity. *See, ., Nikkel*, 460 Mich 558, 567-568 (citing *Komraus Plumbing & Heating, Inc v Cadillac Sands ɔtel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972). As this Court recently reiterated, ı]bsent an ambiguity or internal inconsistency, contractual interpretation begins and ends with ꞓ actual words of a written agreement." *Universal Underwriters, supra,* 464 Mich at 496. oreover, in the context of insurance disputes, Michigan repeatedly has recognized the injustice ıt would result from holding an insurer liable for a risk that it unequivocally did not assume. *e, e.g., Nikkel,* 460 Mich at 568 (citing *Auto-Owners v Churchman*, 440 Mich 560, 567; 489 W2d 431 (1992)).

There is no public policy reason to treat insurance contracts any differently from other ɔes of contracts. As noted *supra*, the courts have many tools to protect policyholders without sorting to an ill-defined "reasonable expectation" that is subject to after-the-fact fictions used the courts to create coverage when it otherwise does not exist. If the court retains the ctrine, it should be applied only in those cases where an independent finding is made by the urt that an ambiguity exists.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the decision of the Court of Appeals is erroneous and ould be reversed. Additionally, the Court should eliminate the doctrine of reasonable pectations as an appropriate principle of contract law interpretation in Michigan.

Respectfully submitted by,

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